MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

ATLANTICO CONSTRUCTION CORP.,

Plaintiff,

INDEX NO.: 008426/2005

-against-

PINEWOOD CONSTRUCTION, INC.,
BRISTLED THREE HILLS, LTD. d/b/a
PINEWOOD ESTATES AT MANORVILLE,
PINEWOOD DEVELOPMENT CORP., THE
BRISTLED FIVE CORP. d/b/a PINEWOOD MANOR,
PINEWOOD HOLLOW, INC., WESTGATE, INC.,
MAJESTIC ESTATES, INC. and PINEWOOD
MANOR WEST, LLC,

Defendants.

DECISION AFTER TRIAL

This action was brought by plaintiff, Atlantico Construction Corp. (Atlantico), a concrete contractor, for monies it claims it was owed for work done on various housing developments owned by defendant, Pinewood Construction, Inc. (Pinewood), or related corporations. Atlantico is owned by Antonio Varela. Pinewood and its related corporations are owned by Uri Hason and Avi Sharabani. The matter was tried before this court without a jury between November 8, 2006 and February 2, 2007. Final submission of post trial memoranda occurred on March 2, 2007.

Atlantico commenced this action claiming it was owed $850,000.00 for concrete work done for Pinewood for which it had not been paid in full. Pinewood denied it owed Atlantico anything and, in fact, claimed it was owed funds for materials plaintiff diverted from defendants' job sites. The relationship between the builder, Pinewood, and Atlantico began in December

1999 and Atlantico continued to work for defendants until October 2004 on ten different job sites. Most were multi-dwelling developments while some jobs were single homes of the individuals Sharabani and Hason, owners of the defendant corporations. The complaint contained causes of action for account stated, breach of contract, quantum meruit, and unjust enrichment.

It is agreed there were no written contracts on any of these developments. There were oral agreements supported by invoices and/or "work orders" or "estimates", labeled "Job Material & Labor Record", signed by Tony Varela and Dominiko Iannucci who was associated with the defendants and who also excavated the job sites.

The trial began in an ordinary enough way. Mr. Varela testified to doing work on a lot on a particular development site. He would offer an invoice for the work done on a particular lot which would include some or all of the following: footings, foundation, front entrance, rear entrance, cellar entrance, fireplace, garage and basement floor. He would then be shown an invoice that would fit the testimony containing a date, a named development, a lot number, a description of the work done, and dollar amounts for the base house, as well as for items he called extras. Varela would testify that he then gave the invoice to defendants. It might have been in person or in some other fashion. This type of testimony continued lot after lot, development after development. On occasion, the defense would interject. There would be a voir dire on a particular invoice. Defense counsel might inquire as to whether there was any payments on a particular invoice. Defendant would ask, "Were there any other invoices on that particular lot?" Were these payments on that work? The response would be "maybe", "could be", "perhaps." No invoice presented showed a payment, yet plaintiff agreed he received payments. Plaintiff's practice, he said, was not to reflect a payment on an invoice. Would that mean he would issue a new invoice for a lesser amount? "No."

On the eve of trial, defendants were given the opportunity to clone or mirror image the computer on which Mr. Varela kept his business records on Quick Books. At the time the business relationship between the parties began, he used a typewriter. He then obtained his first computer, which was replaced by a second computer.

What of the invoices that were typed? Where are they? The dog peed on them so we learned he needed to recreate invoices. What of the invoices that were produced by the first

computer? That computer was ruined by a leak in the house and all the information on it was lost. So we learned the plaintiff needed to recreate those invoices. Again, on the second computer. As we learned, the problem with Mr. Varela's story was that he apparently transferred the computer information from the first to the second computer and modified the invoices dramatically after April, 2004. Another version of the invoice story was that he brought all the invoices to his lawyer when he first retained him, but his lawyer said he could not use them (physical condition), so Varela made up new ones from notes. No valid reason was given why the computerized invoices could not have just been reprinted.

Did the defendants owe plaintiff back pay for a period of time? Yes. They eventually transferred to him a lot in the Pinewood Hollow-Manorville development valued at $200,000.00 on or about April 5, 2004, which apparently tipped the balance sheet in favor of defendants. Shortly thereafter, Mr. Varela went into his computer and modified numerous invoices resulting in money owed to him by defendants being reflected in these invoices, which may or may not have been owed to him prior to that date. This testimony resulted in the court striking all the invoices from evidence, and eventually dismissing all causes of action brought by plaintiff, exclusive of those based on quantum meruit and unjust enrichment.

Even though the court found there was insufficient evidence to support plaintiff's contract claims because of the rejected invoices, it is still possible for plaintiff to recover damages under an implied contract theory called quantum meruit, as plaintiff has argued under its quantum meruit causes of action in its complaint.

In order to establish a claim in quantum meruit, Atlantico must establish:

(1) that it performed its services for the defendant in good faith;

(2) that its services were accepted by the defendant;

(3) that it expected to be compensated for its services; and

(4) what the reasonable value of its services was.

It is clear to the court that Atlantico has met the first three elements set forth above. What remains is the fourth element - what was the reasonable value of the services Atlantico rendered to the various corporate defendants on the specific projects over a five year period?

As the trial morphed into a "quantum meruit" only case, the action began to rely heavily on the price of concrete, actual amount of concrete used on each job site and "lots" within said

site (determined from concrete delivery invoices paid by defendant for the most part), the price of concrete at different times, what original plans reflected measurement wise, and how they were or were not modified. What items (for example, fireplaces, cellar entrances and porches) were or were not to be included in the base price and what was the value of the services rendered on such extras? What prices had the parties agreed would be fair and reasonable for the work completed? If plaintiff had complete or nearly complete labor records, this would have been an easy task, however, such records were not complete.

Plaintiff continually tried to find an expert or experts who could testify not only to the cost of doing this type of work, but what the cost would be for doing a multi-unit development rather then single units. Plaintiff also did other concrete work on the sites including curbs, sidewalks by the "model" homes, as well as entry ways to the developments. The testimony of all the concrete "experts" will be addressed further in the decision.

MISSING WITNESS

Defendant has requested a missing witness charge as to the failure of the plaintiff's wife, who made all the computer entries into Quick Books and prepared the invoices, to testify on the issues of the invoices (re-creation, duplication, modification, etc.). The court had reserved decision on the admission of many of these documents pending her testimony. In that all these documents were eventually rejected by the court when she failed to appear, such a negative inference charge is no longer relevant to any portion of this case and is rejected.

Mrs. Varela's testimony would not be relevant to any of the issues raised by defendant that are still extant. For example, defendant claims that since the invoices reflect work done, then Mrs. Varela, who prepared the invoices, could have testified as to the work done. This is ludicrous. Mrs. Varela served as a conduit for Mr. Varela. She could no more give substantive evidence on what work was done or not done or what extras were done or not or why they were billed than Mr. Varela could deny being the source of all information found in an invoice. Defendants have argued that many of the extras or other work done by Varela is hidden underground and cannot be confirmed or refuted. To some extent that is correct. However, the defendants had a superintendent on every job site, yet, they chose to never call any one of the superintendents.

In responding to the request for a missing witness charge as to Mrs. Varela, plaintiff's

counsel counters with the same type of charge as to Mr. Sharabani, an owner of defendants. Mr. Sharabani sat next to defense counsel nearly everyday of this three month trial. Counsel argues what Mr. Sharabani could have testified to, in general, as to the explanation that could have been provided for numerous questions on each job site.

The points raised by plaintiff's counsel are valid ones and will be considered. However, the plaintiff could have called Sharabani as his own witness. Furthermore, what appears to be a post trial missing witness request by plaintiff cannot be allowed when the defense has not been given the opportunity to explain said failure, or to call the witness of their own accord.

Defendant has also charged that plaintiff intentionally destroyed evidence and must be subject to a spoliation charge, citing various invoices which were replaced by modified invoices. Defendant also requests that the court must infer a fraudulent intent on the part of the plaintiff due to said alterations, Lipschitz v. Stein, 100 A.D.3d 634, 638 (2d Dept. 2004), and that the spoliation of evidence should result in the court viewing plaintiff's claim for funds that remain due and owing in a negative light.

SPOLIATION

Based upon the lack of credibility of Mr. Varela vis-a-vis the invoices, the court struck them. Mr. Varela's lack of credibility may be considered on all issues of the case. However, a spoliation inference, beyond the action already taken by the court in dismissing all contract claims based upon the invoices, is not appropriate. There is no indication that anything done by Mr. Varela has or will prevent the defendants from defending themselves on the remaining causes of action. Furthermore, unless the defendants' bookkeeping system resembles that of the plaintiff (which was not of the highest level) then the defendants would have been in possession of far more invoices than plaintiff and far more than those produced by them in court. They have not set forth any explanation of why they have produced so few invoices or why they have such an abject inability to prove the payments they claim to have made.

Also argued is that since plaintiff's quantum meruit claims lie in equity, they, therefore, must be denied because Mr. Varela comes to court with unclean hands, especially in that plaintiff's unethical conduct, so claims defendant, relates directly to the quantum meruit and unjust enrichment claims. National Distillers & Chemical Corporation v. Seyopp Corp., 17 N.Y.2d 12 (1966).

Defendant also argues that for at least the developments known as Pinewood Hollow, Majestic and Pinewood Manor West, there was an agreement in writing, as to those houses, thus, quantum meruit and unjust enrichment must be denied. Defendant also requested that the court award defendant up to $10,000.00 each for the thirty frivolous claims brought by plaintiff. 22 NYCRR 130-1.1. Further, that it be awarded punitive damages equal to defendant's legal fees 9n the amount of $111,300.00. (Action S.A. v. Marc Rich & Co., Inc., 951 F.2d 504).

AVAILABILITY OF UNCLEAN HANDS DEFENSE TO CLAIMS OF UNJUST ENRICHMENT AND QUANTUM MERUIT

Defendant has argued that plaintiff cannot succeed on its quantum meruit and unjust enrichment claim due to having "unclean hands." The underlying behavior is that plaintiff allegedly stole various construction materials, including concrete from a work site; poured concrete into a french drain at a specific project; that he was responsible for "violations" on the property that he now owns in Pinewood Hollow-Manorville; and that defendant continues to pay a fee on a bond on the development because of said violations.

In commenting on an attempt to bring into a case the equitable rule or maxim that "he who comes in equity must come with clean hands" the Court of Appeals stated, "[w]e hold that this doctrine, whatever may be the limits of its vague coverage, cannot apply here - - and this for a number of reasons. In the first place it is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (Green v. LeBeau, 281 App. Div. 836; 2 Pomeroy On Equity Jurisprudence [5th ed.], § 399, p. 99)' (Weiss v. Mayflower Doughnut Corp., 1 NY2d 310, 316; see 32 Boston U.L. Rev. 66 et. seq.)." National Distillers, 17 N.Y.2d at 15.

More important than the fact that defendant's claims as stated in its final remarks are less than an accurate reflection of the testimony is their relevance to "unclean hands" under National Distillers. Even accepting all of defendant's allegations as fact, they do not negate plaintiff's quantum meruit evidence or serve to support the defendant's defense. Both sides in this matter have regretfully created facts in their proposed "Finding of Facts." The court rejects the defendant's "unclean hands" defense to the quantum meruit claim. That part of plaintiff's evidence which supports its quantum meruit claims which relies specifically on the testimony of Mr. Varela, will, of course, be considered in light of Mr. Varela's less than credible testimony on

various issues, but, most specifically, the invoices.

The court will address each of the developments or homes at which plaintiff poured concrete in order to determine whether a quantum meruit claim lies on that particular job and for what amount.

The record is quite complete on how much concrete was delivered to each site. Testimony from an expert witness, Mr. Suckow, on the volume of concrete needed on each house at each job site was heard. Also, the amount needed to complete those items which Mr. Varela called extras, but which defendants argue were part of the original plans which plaintiff agreed to do at a specific price (oral agreement).

LABOR COST OF CONCRETE

Mr. Ramos, the first of plaintiff's concrete experts, testified to cubic yard prices of $110.00 to $130.00 per cubic yard as a "labor only" price. Mr. Ramos has had no experience with multi-lot developments, or reduced concrete costs for large development purchases. He also testified to the increase cubic yard price for items such as cellar entrances, steps and stoops. Because these items are more labor intensive, he would add $30.00 to $40.00 a cubic yard for these items. For foundation walls above eight feet he would add 20% to 25% above the customary price for the eight foot wall.

Mr. Ramos examined court Exhibit II, the plans for a Buckingham model. He testified that he would use a crew of three to four men to form the footing in one day. It would then take three to four hours to pour. Then four men could form walls in two eight hour days and then pour it in four hours. The basement slab would be poured in one day. His labor rate would be a foreman at $180.00 per day, two at $160.00, two at $150.00 and two at $145.00. This might have been valuable if we had reliable labor rates to plaintiff's crew, but we do not.

Mr. Carvalho is also a concrete contractor having learned his trade from his father. He does non-union residential concrete work. He has done some multi-unit jobs. He also described how he would proceed to build a typical foundation and price a multi-unit development. He would price labor at the cost of cement and then reduce the price by 10% for a multi-lot discount. He noted that if there was brick work, he would charge extra for the brick shelf, but only on the side of the building where there was brick. (Defendants have claimed plaintiff has calculated the price for a brick shelf based on the entire foundation yardage.) Carvalho would increase the price

for a 9 foot foundation by 10% over an 8 foot foundation and a 20% increase for a 10 foot foundation.

Paul Cerquera was called by the defense as their concrete expert. He served a dual purpose. One was to value the work on the quantum meruit claim and the other to explain how Mr. Varela either negligently or intentionally mislaid the foundation on Lot 5 at the Majestic development.

Mr. Cerquera's expertise was not really challenged by the plaintiff in the "cost of concrete" area, but he dramatically challenged his opinion on whether Mr. Varela "mislaid" the foundation at the Majestic development.

Mr. Cerquera testified that he would price a multi-lot job by a rate double the cost of the concrete less 10% to 15% for labor and materials. Generally, Varela had testified similarly to pricing a job at less than double the cost of concrete (for labor and materials). Carvalho and Cerquera both priced steel work at double the cost of the steel for labor and materials. He would price a 9 foot foundation at 10% more than an 8 foot foundation, and a 10 foot foundation at about 20% more than the 8 foot foundation.

Cerquera has and still works for Pinewood. Thus, his opinion is subject to the normal qualification that one would make in evaluating the credibility of any party employee. He would price an outside basement entrance at $1,000.00 to $2,000.00, similar to Varela. Waterproofing would be an extra as would the rental cost of a pump (concrete) which would be charged to the builder.

Considering the testimony of the concrete "experts", the court concludes that labor and material cost should be twice the cost of the concrete less a 10% volume discount. For labor only, it would be the cost of the concrete less 10% for a volume discount. A brick shelf would raise the price by 10%, but only for the yardage of the shelf - not the entire foundation. An outside basement entrance, when it is an extra, should be billed at $1,200.00. The labor cost on steel will be the cost of the steel. When appropriate, the court will apply these rates to the concrete work on each development, but not on the individual homes of the defendants nor on the North Sea job.

JOB NO. 1, MANORVILLE - MARIPOSA

Plaintiff worked on this job from December 11, 1999 to May 21, 2003 (a/k/a Pinewood

Hollow at Manorville and Pinewood Estates at Manorville). He also worked on other jobs for defendants during this same period. Plaintiff was not the first concrete contractor on this job. He was called in to finish the work of another contractor. He poured foundations on Lots 8, 9, 12 and 19. He did repairs on Lots 4, 14, 15, 16, 20 and 11. Atlantico also poured 479 linear feet of curb and 3005 square feet of sidewalk at this job site.

Plaintiff, beside relying on his own testimony as to the work done on a particular job site, presented documents known as "Job Material and Labor Records," sometimes known as JMLRs. These are documents he created, allegedly as worksheets, to determine the price of a job.

Plaintiff argues that the job was billed at a total of $93,340.00 (labor and materials). That after credits for concrete which was paid by defendant, and payments made by defendant (Exhibit 4), the balance due plaintiff is $9,313.13. Plaintiff relies on Varela's testimony. All the invoices that might support it have been stricken by the court. Notably the rejected invoices were created after the checks were issued.

The original complaint claimed $4,000.00 more than the amended complaint and there is no explanation for this. At an examination before trial Mr. Varela stated nothing was due on this job. There is no explanation for this either.

Plaintiff's Exhibit 4 reflects photocopies of defendant's checks used to pay for the work on Manorville (including repairs on specific lots as referenced above). According to the JMLR (Job Material and Labor Record) for Lot 8 (Exhibit 71) on Job #2, there were 93.5 cubic yards of concrete used on a Cedar Model. This, plaintiff contends, is similar to the model built on Lots 8, 9, 12 and 19 on Job #1. Plaintiff also notes that the porch on Lot 8 on Job #2 was an extra ($2,000.00) so, therefore, the court should conclude that any porch on Job #1 was also an extra. Further, that defendant paid this without objection. However, Lot 12 on Job #1 has a porch which was included in the price and was paid. It is also noted that court Exhibit X, which purports to reflect prices for models on the Yaphank job (Job #2), shows $1,500.00 on an extra porch.

On Lot 9, the plaintiff argues that piers for the wooden deck were charged as extras as well as a 9 foot foundation. Check #1834 (found in Exhibit 4) covers Lot 9 as per check notation. As previously noted, plaintiff argues that models on Job #2 were similar to Job #1 and, thus, the court should accept and use the prices on Job #2 also on Job #1. He also argues that the

check in Exhibit 4 reflects payment on invoices on Job #1 and in full for Lots 20 and 9.

The invoices submitted at trial were created after the checks were paid, years afterward. Defendant argues the invoices, which are not in evidence, were created to fit the checks. Reference to piers for wooden decks is not supported by the testimony. Furthermore, the record does not reflect money owed on repairs on Lot 11. The related invoice was rejected by the court based on backdating.

Plaintiff relies on what the court considers conflicting and convoluted evidence to support this claim. That, combined with the examination before trial testimony that no money was owed, precludes a finding on quantum meruit on plaintiff's behalf. Any claim for Job #1, the fourth cause of action, the Manorville-Mariposa project, is rejected.

JOB #2, YAPHANK
(44TH CAUSE OF ACTION)

Mr. Varela agreed to do the concrete work on the Yaphank development while he was working on Job #1. He was provided with plans for the different models by Mr. Hason in early 2000. He responded with a bid on each model on a single sheet of paper. This sheet of paper, court Exhibit X (Roman Numeral 10 as differentiated from defendants' Exhibit X (letter)), was not produced during discovery and surprisingly showed up during plaintiff's direct. However, these prices coincide with the few invoices produced by defendant upon which they allegedly paid, thus, adding to the reliability of court Exhibit X.

Yaphank was a 76 home development. Plaintiff argues he poured 77 foundations because the work on Lot 52 had to be torn out and repoured due to a change in work order from an Evergreen to a Cedar model. This is denied by defendants. Plaintiff worked on the Yaphank job from January 15, 2000 to June 3, 2001.

A key issue on the Yaphank job, as on others, was what was to be included in the base bid price given by Mr. Varela and what, if anything, was to be considered an extra (i.e. porch, fireplace, cellar entrance). This point was quite important when dealing with the accuracy of plaintiff's invoices (now no longer in evidence). If the court allows the plaintiff to proceed solely on the amount of total concrete poured and a price per yard (as per one or another "expert"), it negates the "work orders" on this job site. The work orders, Exhibit 57, are bare bones directions to plaintiff to do specific work on a "lot" by "lot" basis created by defendants.

In a sense, the defendants find themselves in an interesting position. The court has systematically dismissed all causes of action in contract, and for an account stated and, on defendants' motion, struck or refused to admit into evidence most of the invoices. Now when plaintiff relies on his quantum meruit claims, the defense relies on "work orders" to defeat quantum meruit claims and this could result in a finding based on an amount in a work order, combined with court Exhibit X.

The plaintiff mixes continuous references to invoices that have been removed from evidence, with total volume of concrete poured and the labor rate per cubic yard. He drops back and now references "work orders" which he had earlier claimed were modified on site, in that the invoices have been removed from consideration by the court.

Plaintiff's counsel states that Atlantico had a practice of sending out several invoices on each lot. The initial one would be for the base price and then a second or third invoice would reflect the extras. The only invoices to have been produced upon which the court is able to rely have, as noted, been produced by the defense, and then very few of those. However, those show (Exhibit C) that in some cases there is a base house charge and in others there is a base house plus extras, not multiple invoices per lot.

Plaintiff proffers claims for curbing at a price of $8,950.00 ($10.00 per lineal foot) and sidewalks on Lot 22 ($1,516.00), Lot 23 ($3,876.00), Lot 24 ($2,244.00) and Lot 25 ($1,412.00). There is no challenging either the fact that this work was done nor its quality.

BALANCE OF PAYMENTS

It would appear that at some point, probably late in the year 2000, the defendants stopped or fell behind on payments. Defendants deny this yet there is evidence of lump sum payments ($47,100.00 and $49,500.00) dated April 3rd and 4th, 2001. They were deposited on April 4, 2001. The work orders for Yaphank (created by defendants) are spread throughout the year 2000 and up through June 25, 2001. Some "work orders" have printed numbers in the upper right corner, others are handwritten. Some work orders reflect specific extras. Almost all the "work orders" said "standard plan as per contract" or "base house as per plan" and would, on occasion, state "with fireplace", "with den F.P.", and /or "outside cellar entrance."

When the court compares the early invoices on Yaphank (labeled "Estimates" but on which defendants made payments), produced in court by defendants, but created by plaintiff

(typed by his wife Exhibit C), and paid by defendants with the "work orders" (Exhibit 57) created by defendants and introduced by plaintiff, the court reaches some interesting conclusions.

For example, Lot 26, Aspen. The "work order" (Exhibit 57, work order #5) says:

(1) House as per contract
(2) Fireplace
The invoice (Exhibit C) states: footings, piers, foundation, floor, steps and windows - $8,600.00.

The claim for an additional fireplace is consistent with defendants' work orders, but was not billed as an extra on the invoice originally sent to defendants by plaintiff. It is requested on Mr. Suckow's (expert) work sheet at 3 cubic yards. The existence of the fireplace relies on the credibility of Varela, whether or not it was built, and if it was an extra.

The Pine on Lot 36 reflects a similar issue. The work order calls for a fireplace beyond the "standard plan." The invoice found in Exhibit C (page 48) does not reflect the fireplace and it is <u>not</u> requested in Suckow's recap. However, an "extra step" is requested. No porch or garage is part of any Pine model, but there is a "step" added on each. According to court Exhibit X, "steps" were to be $1,000.00 and a fireplace $500.00.

The additional fireplace invoiced on Lot 23 (Aspen) is billed at $200.00, not the $500.00 as noted on court Exhibit X (produced by plaintiff). The invoice description of each Pine model actually lists "steps" as part of the base price, not as an extra yet the plaintiff claims it is an extra.

Lot 1, a Cedar, has a work order (#6) that states:

(1) House as per contract
(2) Add den option as per plan
(3) Fireplace
(4) Install (2) outside entrances with dry well (on sides of house).
Doors 30 - 68 [indicates size].

The invoice (Exhibit C) lists the base house	- $ 8,700.00
Additional den	- $ 1,000.00
Additional cellar entrance (2)	- <u>$ 2,000.00</u>
	$11,700.00

Thus, we almost have consistency (no fireplace) with the work order and the invoice as well as with prices listed on court Exhibit X. Mr. Suckow's recap of cubic yards used reflects a den, <u>one</u> additional cellar entrance and a "step." The invoice (paid by defendants), as noted, has two cellar entrances, a fireplace, a den and no step (included in the base).

On Lot 16, Cedar, the work order calls for cellar entrance and a fireplace (beyond the base house). The invoice bills only for the cellar entrance, not a fireplace. Mr. Suckow's recap from Exhibits 111 and 112 as used by plaintiff's counsel claims cellar entrance and a chimney [fireplace]. However, the cellar entrance was included in the "house as per contract." It appears plaintiff would be entitled to a "fireplace" above and beyond what he billed for. Furthermore, based on Mr. Hason's testimony, the cellar entrance was an extra at Yaphank, but included in the base price at later projects.

On Lot 18, Aspen, the work order calls for the base house with a fireplace. The invoice does not list any extras. Mr. Suckow's recap lists a fireplace and a den based upon plaintiff's instructions. The cubic yards went from 3 cubic yards on Lot 16 to 4 cubic yards on Lot 8 for a fireplace. They were invoiced on the same date in March 2000. The exhibit is, on occasion, internally inconsistent.

On Lot 42, Evergreen, the work order calls for a fireplace beyond the basic house. The invoice does not list any extras for the Evergreen and gives a price of $7,400.00. Court Exhibit X, Mr. Varela's list of base prices, does not include a base price on the Evergreen. Mr. Suckow's recap, a combination of Exhibits 111 and 112, put together by plaintiff's counsel, lists a den and a step, but no fireplace.

On Lot 25, the Gazebo model was erected. The work order for the Gazebo lists a fireplace and special instruction for the construction of the porch. The invoice for this lot (Gazebo), as produced by defendants, shows no extras. However, a $10,150.00 amount is crossed out and a handwritten $10,000.00 is put in (apparently what the defendant chose to pay). The porch on this model is 21 cubic yards, over two times the size of the nearest porch in cubic yardage. Court Exhibit X states a $5,000.00 price on this porch for the Gazebo. This document was allegedly completed on May 10, 2000. The invoice on the Gazebo is dated March 5, 2000. The work order is dated 2-11-(blank) (fax date 2/10/00).

Lot 26, Basic Aspen, work order calls for fireplace. The Atlantico invoice produced by defendants has no fireplace. There has been no argument that the fireplace, beyond the base house, was poured. Inference? The invoice paid by defendant did not include a fireplace.

What can be learned from this string of somewhat inconsistent factors? Some things are clear, the plaintiff, from the earliest days of its work for Pinewood, claims he would submit

multiple invoices on a particular lot; the earliest invoice may or may not have billed for extras; the extras were usually set forth on the defendants' work orders, but may have also been built upon the directions of an on-site foreman empowered to act by the defendants on their behalf (no on-site foreman was called as a witness by either side); from Job #1, Mariposa, and going forwards through at least Yaphank, Job #2, porches were considered part of the base house, not an extra.

However, extra dens, outside cellar entrances and perhaps additional fireplaces were extras and were not always billed as such. Plaintiff argues that by the end of the year 2000 the defendants were indebted to him over $250,000.00. At a meeting in late 2000 or early 2001, Varela argues Hason agreed to give him a lot in one of the developments and pay him interest on all subsequent invoices. The lot exchange took place in 2004.

Using court Exhibit X and the invoices that are in evidence as found in defendants' Exhibit C, the court determines and accepts the base price of the models built at Yaphank and the number of each model built and extrapolates them to all models as a fair and reasonable price for the work done on the lots and models.

Number	**Model**	**Base Price**		**Total**
22	Aspen	at $8,600.00	=	$189,000.00
27	Cedar	at $8,700.00	=	$234,900.00
7	Spruce	at $8,700.00	=	$ 60, 900.00
11	Pine	at $5,400.00	=	$ 59,400.00
5	Evergreen	at $7,400.00	=	$ 37,000.00
2	Cedar II	at $8,415.00	=	$ 16,830.00*
1	Gazebo	at $10,000.00	=	$ 10,000.00
TOTAL - 75 houses				$606,998.00

*Price based on cubic yards from Mr. Suckow's calculations times $85.00 per cubic yard.

The court accepts the above based on all the testimony, and that there was no complaint made as to these prices as per the testimony, and plaintiff's invoices that were submitted by defendants, Exhibit C, reflect add on of extras that were paid. Thus, these amounts were a fair value for the services rendered (cellar entrance - $1,000.00, extra den - $1,000.00 and fireplace - $200.00).

As far as the value of "extras", the court finds that a garage and porch were never to be

considered as extras and will not be considered as such at this time. The only porch which appears to have been an extra, beyond the price of the base house, was the unusual one on the Gazebo.

The court will award plaintiff a quantum meruit value for the extras it determines the plaintiff actually did build based on the cubic yards determined by Mr. Suckow and the price per cubic yard as determined from the testimony of the parties' experts.

The court rejects the plaintiff's theory of two foundations having been poured on Lot 52 with an Evergreen replacing a Cedar. There are two work orders found in Exhibit 57 for Lot 52. The Cedar on Lot 52 is dated July 1, 2001 and bears a fax date of July 1, 2001. The work order number in the upper right corner is 2348. The Evergreen work order for Lot 52 is dated August 4, 2000 and bears a work order number of 1595 (obviously an earlier number). There is no explanation why the later work order would be for the model that was torn out and replaced by the work order from a year earlier. Plaintiff lists Lot 32 as "special" in its post-trial memorandum with no value attached to it. In Exhibit 57 the work order for Lot 32 calls the house type "special."

There is evidence to support one "step" found in the work order for Lot 2. Defendants argue there was no extra chimney on any of these models, yet, the Aspen on Lot 23 listed a fireplace as an extra ($200.00). The work orders frequently, at least sixteen times, call for fireplaces. It cannot be determined whether this was an extra or part of the base house. In fact, the work orders, more frequently and on different lots than those on which plaintiff claims he built the foundations for chimneys, state fireplace (for the court "fireplace" and "chimney" are interchangeable). The testimony on chimneys is inconsistent with the evidence (documentary) on chimneys/fireplaces. The court cannot determine from the testimony and other evidence whether fireplaces were part of the original plans, or whether the work order meant an additional fireplace. The invoices found in Exhibit C for the Yaphank job do show a fireplace as an extra on Lot 23, but the testimony is too inconsistent to be reliable. However, the court is convinced cellar entrances were to be extras (Lot 1, Lot 16) (testimony of Hason) (Exhibit C).

The court will allow the following "extras" at the indicated cubic yards and price per cubic yard of $85.00. The cubic yard price being determined by the evaluation of all concrete experts.

	Number Of	Total Yards	Price Per Yard		
Step	1	3			
Den	12	34.9			
Cellar entrances	16	123.9			
		161.8	X	$85.00	= $13,753.00

Total charges allowed by the court on Job #2, Yaphank, equals $620,751.00. The evidence reflects $301.900.00 has been paid on this job leaving a balance of $318,851.00.

The court is well aware of the defense arguments as to the reliability of Mr. Suckow's calculations in that they are based on Mr. Varela's unreliable testimony. However, it does not affect the court's ruling on Job #2. Furthermore, if the court was to award what appeared to have been the agreed to price on the extras as partially found in court Exhibit X, the cost of the extras would be $87,000.00.

JOB NO. 3, NORTH SEA

This job started in January of 2001. There was almost nothing done on it for the next three years until it was completed in September 2004. It is appropriate at this point to discuss the other experts called by both sides on the issue of the value of plaintiff's services to support its quantum meruit argument.

William R. Suckow, P.E. is an engineer who examined the plans for each of the homes for which plaintiff did concrete work and determined the cubic yards of concrete that would be needed for each model. The court accepts the expertise of Mr. Suckow and does not doubt his measuring and calculating ability. However, Mr. Suckow relied on Mr. Varela as to what Mr. Varela claims he did on each lot on each job site. The court will consider this when using Mr. Suckow's determinations as marshaled within plaintiff's Findings of Fact on a per job basis.

This was a comparatively small job which Varela argues he was not interested in doing due to the alleged problems of collecting on Job #1 and Job #2 (the first house on Job #3 was built in 2001). Despite this alleged reluctance he agreed, in response to a call from Hason to do the work. Varela met Victor, a Pinewood employee, at the South Hampton job site where he was to be shown plans. The excavation had been completed prior to his arrival. The plans called for an eight foot foundation. Plaintiff claims the excavation had been dug too deep and he was asked to put in a nine foot foundation because the inspector wanted to have the foundation poured on "virgin" soil, not soil which had been replaced in the excavation. The court has no idea where

this hearsay "testimony" came from. There is no testimony that a town or village inspector controlled the height of the foundation. Of course, there is also no testimony from any of defendant's superintendents as to what did or did not happen on this job site, or any other job site.

Plaintiff claims he told Hason he would do the foundation at $23,000.00 per lot. This was a Cedar model that cost $8,700.00 at Yaphank. Varela argues Hason agreed to this price and sent a $20,000.00 check to the job site with a superintendent. This was check number 1844 and the notation "O/A" (usually meaning "on account."). Hason testified that he had agreed these two models were to be $10,000.00 each. Again, Varela argues that an eight foot Cedar in Yaphank with "just a porch" (which he has argued was an extra) was $10,200.00. This would have been $8,700.00 plus the $1,500.00 porch, and a similar model in Job #1 was $14,622.50. In the Golfview development a Cedar with nine foot walls (eight inches thick) was $10,700.00, porch and den extra for a total of $13,200.00.

In his testimony Mr. Varela raised the walls to nine feet six inches and included two and one-half tons of reinforcing steel. Hason denied the use of more than one rebar in the foundation and in his closing argument claims there was no steel nor was any wall more than eight feet high or eight inches wide. Varela said concrete cost $85.39 per yard, while defendant argues concrete was $67.00 per yard (Exhibit 21). The court accepts with $71.00, as shown by plaintiff's Exhibit 21 ($71.00 includes winter mix additive).

Plaintiff would add $9,000.00 labor and materials for the installation of 2.5 tons of steel (based on a labor rate of twice the cost of the steel with steel costing $1,800.00 ton). The other three models of Job #3 were built in 2002-2003 and the Fish Cove house in 2004.

Plaintiff's version of the facts on these three models was that Hason said two of these models had nine foot foundations and one had a Gazebo. There was no evidence of this. Varela testified that all three were eight feet Cedars originally and there was steel in each. He needed more concrete for the Gazebo model, but instead of putting it on an invoice for that model, he spread it over all three models. It appears Varela conformed his testimony to the invoices which were rejected by the court and which defendant, in any event, argues, were false.

There was an "apron" poured on this job in 2003. The charge was $3,500.00 per Exhibit 84. Exhibit 22 contains a sketch for the apron. Plaintiff argues that a smaller apron, on Job #4,

was done in 2002 for $3,000.00 which defendant paid. Thus, plaintiff argues logically this charge was correct. Exhibit 63 reflects twenty-four yards of concrete. The $3,5000.00 price would far exceed an $85.00 a yard labor rate. However, Varela claims he made two attempts to pour, but was prevented by an inspector. Once for an unknown reason and a second time because of frozen ground. The actual "pour" taking place on February 27, 2004. Because of all the unnecessary trips, Varela argues his $3,500.00 price is reasonable. Defendant argues Varela's testimony reflects three trips and three cement orders, but the cement invoices do not support this. If he was actually ready to pour on each occasion, there would have been proof of delivery or attempted delivery.

Varela needed to return to these three homes to drill holes in the basement floor for the installation of pumps. The charge was an additional $1,500.00. Hason argues that these return trips were caused by Varela's incompetence. Even though the plans did not contain floor openings, Varela had made such openings on the first two homes he had poured on the site two years earlier.

The sixth house counted within this development was on Fish Cove Road. Both sides agree it was eventually priced at $37,000.00. Defendant argues he paid it. Varela added $2,000.00 for two lost days of wages he had to pay his men ($39,000.00). The plaintiff failed to produce payroll records to support this. He also claims defendant should be responsible for rental of a concrete pump. Defendant on the other hand argues this was plaintiff's expense on this job.

Plaintiff points to Exhibit 62 which shows 113 yards were delivered. However, the foundation apparently takes 119 cubic yards. Where did the balance come from? Varela said he got it for free from a nearby site where they did not need it. In that a delivery to two sites is or would be called a split load, there should be an invoice to support it. No concrete invoice was submitted that would support this theory. Defendant argued they paid $30,000.00 and $37,500.00 for the last three houses and $20,000.00 for the first two, and further argues that since Varela cannot show he is due any money (i.e. that he was not paid in full), a quantum meruit claim does not lie. However, Varela cannot be asked to prove a negative. Defendant has not proven payment for the above claimed paid amounts except for $20,000.00 and then a recently discovered $10,000.00 amount which plaintiff credited to defendant on Job #4. The amount of

concrete used on these lots: Fish Cove - large lot - 181 cubic yards. Exhibits 19, 61 and 62 reflect 474.5 yards of concrete on the last three houses including the large home on Fish Cove. The first two houses used 205 cubic yards with a cost of $70.00 per cubic yard (as per the court) (as per Exhibit 21). Varela also claims use of steel at $1,800.00 per ton totaling $9,000.00 in labor (2.5 tons of steel + $4,500.00 for labor) (Exhibit 82) (Job Material and Labor Record of plaintiff). There is no evidence of who paid for this, if anyone.

Cutting of holes in basement floor for water pumps - the plans did not contain directions for the cutting of holes in the basement floor. Even though Varela had cut similar holes in the basement floor of the first two houses, he was unaware he should do it at this job, over a year later. Upon request, he returned to the site and cut the holes. Defendant argues Varela should have known to cut the holes. Credit to plaintiff for $500.00 per hole = $1,500.00.

From the testimony there would appear to be an agreement on the price on the Fish Cove Road house of $37,000.00. The court will accept this as an agreed price.

Thus, the court finds the value of the work on Job #3 to be as follows:

First two houses (3/01)	
Labor - 205 cubic yards at $71.00 per yard	= $14,555.00
Concrete cost paid by plaintiff	= $15,672.00
Steel - no credit given - no proof of delivery or bill for it	= None
	$30,227.00
Three Cedar models constructed in 2002	
Labor (293.5 cubic yards X $85.00 per cubic yard)	= $24,948.50
Concrete apron - labor	= $ 2,200.00
3 holes cut in basement floors	= $ 1,500.00
Fish Cove (large house)	= $37,000.00
(August 9, 2004) Based upon agreed price as court finds from testimony. Not including concrete pump.	
Concrete pump (2 days)	= $ 3,262.50
Total for Job #3	= $99,137.50
Amount paid	$20,000.00
Balance due plaintiff	$79,137.50

JOB #4, NEW YORK AVENUE

Invoices for this job were found in Exhibit 109. Exhibit 52 contains the checks on this job (including the check for $10,000.00 also seen as Exhibit Y). Though this check should have been for Job #3, it was credited to Job #4. This resulted in an overpayment on Job #4 of $1,620.00. Plaintiff carried this credit to Job #6.

JOB #5, GOLF VIEW ACRES (29TH CAUSE OF ACTION)

Varela started work on Golf View in February 2002. The work was completed on October 29, 2002. He contends he stopped work due to unpaid invoices on earlier jobs. Quotes on Job #5 as well as #4, #6, #7, #8, #9 and #10 were allegedly given at the end of 2000 and in the beginning of 2001. As stated, he left the job over a money disagreement, then returned to it.

There does not appear to be a disagreement on this job. The job cost $113,350.00. The cost of concrete paid by defendant was $46,535.96. Balance due plaintiff $66,814.04 less payments made to plaintiff, $66,400.00 equals $414.04.

JOB #6, WESTWOOD (14TH CAUSE OF ACTION)

Westwood was a large single family home constructed by Mr. Hason for himself. Varela constructed the foundation, basement and garage floor as well as front and back steps and a porch. The basic house used 383.5 cubic yards. He contends the price for the job was $93,300.00. What plaintiff calls extras, back porch and step and front step consumed an additional 22 cubic yards. He poured aprons and constructed other basic items. There was steel used as well. He states he agreed to bill Hason at $85.00 per cubic yard.

Varela testified that the foundation contained a highly unusual feature - two inch styrofoam insulation in the foundation walls along with steel reinforcing rods and wire mesh. The walls of the foundation allegedly contained wire mesh on one side, foam in the middle and the rebar on the outside. None of the other concrete men had ever heard of this. A bobcat was kept on the job for three weeks for grading the property and moving concrete and extra dirt around the site.

Varela testified he met with Uri. He was given the plans and marked them up. He states he was to be paid by the cubic yard and by the time he spent on the job (extra time due to

changes in "specs"). It was not clear what was meant by the "time on the job" factor, nor was a dollar amount attributed to it.

Court Exhibit III are the plans for the Westwood house. Exhibit 80 is also a set of plans for Westwood. There are numerous changes from court Exhibit III. Total cubic yardage for Westwood, including curbs, foundations, piers, driveway apron and base house, is 461.5 cubic yards (based on concrete delivery).

Varela testified that originally he was not to give the defendant an invoice on this job, but Uri, months later, said he needed one. Varela stated he charged $8,000.00 for the above mentioned extras (20 cubic yards) which he contended also contained steel. He also poured 140 linear feet of curb at $12.00 per running foot. He also poured four driveway entrances, pier footings and foundations, did brick work and installed a pipe for electrical lights for which he charged $3,200.00. There were two driveway aprons for which he charged $1,500.00 each. He charged $9,000.00 for the Bobcat, allegedly on site for three weeks. Varela contends he also did work that included a sidewalk by the swimming pool as well as a sidewalk to the house and a big pier by the pool. For this he charged $17,322.50.

Mr. Hason's testimony differed markedly with Varela's version of the facts. He actually argued that he and his brother poured the 59 yards seen in Exhibit 14 (deliveries made in 2002, September 7 to September 10, 2002 that Varela had ordered). Plaintiff argues the reasonable value of the work on Job #6 is $93, 300.00 (the same amount he had invoiced). Varela subtracts a credit owed from Job #4 of $1,620.00.

Mr. Ramos gave a cubic yard price of $200.00 as per court Exhibit II. He did not and could not give a price for the house as built because he had no experience with this unusual construction style of rebar, mesh and styrofoam.

Carvalho gave a price of $100.00 to $200.00 per cubic yard using wire mesh in the foundation, and would charge additional amounts for the "extras."

Defendant disputes plaintiff's summation memo in many ways. Initially, there was no testimony about a Bobcat on site for three weeks. Further, defendant claims plaintiff received a $30,000.00 cash payment on this job.

As stated, this construction was highly unusual. The additional elements of the foundation have never been heard of by any of the other witnesses. Different extras were

charged at a much higher cubic yard rate than others. Actually, there was no rate, but when you divide the amount charged by the cubic yards used (i.e. front step - eight yards - $2,000.00 equal $250.00 labor per cubic yard), you get much higher labor costs.

There were 461.5 cubic yards of concrete delivered to the site. Allegedly Mr. Hason and a relative used 59 cubic yards. Mr. Suckow stated the house, not including the steps, was 280.5 cubic yards. Mr. Varela testified to 383.5 cubic yards. There is no explanation of what happened to the balance of the concrete delivered and very little clear, credible testimony about anything else on this house (beyond the fact that it is a very large home). However, Mr. Hason measured the foundation during trial and determined it was 16 inches wide, more than the average foundation (he was apparently surprised to learn this).

As noted, Mr. Ramos testified that he would have charged $200.00 per cubic yard on the house pursuant to the original plans. The court rejects Mr. Ramos' estimate.
The court will allow $85.00 per cubic yard (as per Mr. Varela) on the 383.5 cubic yard allegedly used for the house ($32,597.50), and will allow payment for the additional items as follows at a rate of $100.00 per cubic yard unless otherwise stated.

Front step	- 2 cubic yards	x $100	= $ 200.00
Back porch and step	- 14 cubic yards	x $100	= $ 1,400.00
Curb	- 140 linear feet	x $ 12	= $ 1,680.00
Driveway entrance pier footing (4)			= $ 3,200.00
Two driveway aprons			= $ 1,500.00
			$ 7,980.00
Total allowed on Job #6			$40,577.50
Less credit from Job #4			$ 1,620.00
Balance due			$38,957.50
Credit for cash payment			$30,000.00
BALANCE DUE PLAINTIFF			$ 8,957.50

JOB #7, OLD WESTBURY
(FEBRUARY 9, 2002 - OCTOBER 29, 2002)

As in Job #6, this was also a custom built house. This house was built for Avi Sharabani, Uri Hason's "partner." The actual foundation was constructed between April 13, 2002 - September 14, 2002. The plaintiff's memorandum of law describes multiple problems including

being precluded from starting work without permission of the local building inspector and additional costs due to such delays.

The inspector required more steel and refused to allow the foundation to be poured until he was satisfied. What is wrong with this story? It is not part of the evidence. There is no testimony to support it. On the other hand, defendant's counsel (not testimony) affirmatively stated that building inspectors do not require or inspect french drains. That is helpful to the court, but, regretfully, once again our written memoranda and findings of fact create testimony. This back and forth creativity on both sides, when it comes to testimony, has left the court on its own, not only when determining the credibility of the parties, but as to what they actually said.

Mr. Suckow, the engineer, testified that the cubic yards for the Old Westbury house were 240.2 yards. Then there would be an additional 17.9 yards for the garage, 11 yards for the cellar entrance and 6 yards for a chimney. Approximately 35 additional yards for a total of 275.1 yards. According to the concrete delivery information, 427.5 cubic yards were delivered to this site. Where did the balance go? Mr. Varela argues it was needed based upon additional costs and changes required by the inspector. Once again, there is no testimony to support this. The court will allow 275.1 cubic yards at $125.00 per cubic yard labor equaling $34,387.50, previously paid $31,500.00, balance due $2,887.50.

JOB #8, MAJESTIC
(APRIL 16, 2002 TO OCTOBER 6, 2004)

Varela gave a bid on the homes in Majestic in late 2000 or 2001. Varela claims he gave a price for the basic house and then a separate price for basement, outside entrances and steps as extras. Brick work was not included in those prices. Allegedly the bid price was $150.00 a cubic yard because of the needed brick shelf (labor and materials). There was a water problem on this site and dealing with it was to be an extra. Varela stated defendant was to pay for any steel, pump truck and waterproof additive for the concrete. Though the plans did not call for steel, it was allegedly used as per a direction from Hason. Allegedly, again, these houses were to have 9 feet foundations.

Defendant argues that plaintiff cannot receive a quantum meruit recovery on the job due to a completed contract or at least an agreement or perhaps more accurately a memorandum.

There are numerous conflicting claims and what was built and how. Mr. Suckow did not

calculate cubic yards for a 9 foot foundation. Plaintiff thus extrapolated from an 8 foot and 10 foot Buckingham and Windsor to come up with 9 foot foundation volumes.

Out of the ten lots on the Majestic project, Varela did eight fully (excluding 7 and 9). Another contractor completed these lots when Varela stopped work, apparently because he was not getting paid. Varela was called back to the job and did Lot 4.

There was brick face work done on three Newports (Lots 4, 8 and 10) and on the Buckingham on Lot 6. The brick work was only on the front of the house. The brick face on the Newport was 800 square feet and 1,120 square feet on the Buckingham.

These homes were erected over a three year period 2002 to 2004. Varela's cubic yard labor rate allegedly rose from $150.00 per cubic yard in 2002 to $165.00 per cubic yard in 2003 and $180.00 per cubic yard in 2004. This he bases on the testimony of the plaintiff's first concrete expert, Mr. Ramos, who had no experience in multi-unit development. The actual cubic yards used in the construction as calculated by plaintiff's expert differs from the plaintiff's own calculations.

For the eight models completed by Varela, three Buckinghams, one Windsor and four Newports, Varela contends he used 2,217 cubic yards while Suckow's calculations reflect 2,075 cubic yards. Varela partially explains this by indicating he counted a retaining wall built on Lot 4. He also attributes part of the difference to waste when you use a pump truck. Further, he put two basement floors (to manage the water problem) in all models except Lot 7 and Lot 9.

The defense adamantly rejects plaintiff's claims for "footings" as found in plaintiff's memorandum (paragraph 77) and they would have to be eliminated because they were not in the plans presented to Varela. Varela poured (allegedly) 8 to 10 foot footings while all experts agreed this should have been 3 foot. There would be no reason to pour deeper footing equal to the depth of the foundation beyond the fact that it might have been convenient for the contractor.

He uses the same argument for the "steps" (not in plans and was supposed to be wooden). If you would remove these items from the concrete totals, it would reduce the net poured by 246 cubic yards. Defendant also rejects the testimony of Varela that he had to pour second basement floors (separated by a plastic membrane that funneled the water that would accumulate to sump holes). Defendant contends this comes from the invoices which are not in evidence and which were created to overcome the fact that Varela owed defendant after the transfer of the lot valued

at $200,000.00 on Job #9, Manorville. However, defendant wishes to describe it, it also comes from Varela's testimony.

There was a total of 2,167 cubic yards of concrete delivered to the Majestic job site between April 16, 2002 to October 6, 2004 (Commercial Concrete and Nicolia Concrete) (Exhibit 26, Recap of Deliveries). The price of said concrete including sales tax paid by defendants was $209,898.95.

There was an additional 130 cubic yards of concrete delivered by Jet Redi Mix for Majestic on June 25, 2003. This was paid for by the plaintiff (Exhibit 28, p. 7) at $80.00 per yard plus tax for a total of $11,310.00. Total labor price for the Majestic development, averaging in winter concrete additives ($3.00 to $4.00) and pump additive ($3.00 per cubic yard), is fixed by the court at $77.00 per cubic yard in 2002, $71.30 per cubic yard in 2003, and $72.00 per cubic yard in 2004. The average labor rate over three years based upon the amount of concrete delivered to the site over three years is $72.20 per cubic yard.

Pursuant to the testimony of Mr. Suckow, 2,075 cubic yards of concrete would have been used on Job #8, Majestic. Mr. Varela disagreed and testified to 2,217 cubic yards. The court will allow an additional 80 cubic yards for additional pours on slab floors and add it to Suckow's total. Thus, the total cubic yardage allowed on Majestic is 2,155 cubic yards. Using a labor rate of $72.20 per cubic yard, the amount due on Majestic becomes $155,591.00. Reducing this by 10% (Carvalho formula) $15,559.00, the net cost becomes $140,032.00. In addition, the court will add to that the brick facing work at $11.00 a square foot (3,520 square feet x $11.00) equaling $38,720.00. The court finds the total reasonable value of the labor on Job #8, Majestic, is $178,752.00. From this amount the court deducts $50,000.00 which the court concludes the defendants had paid on this job. Furthermore, the court gives the defendants credit for $60,078.30 which defendants paid for concrete that plaintiff had delivered to another job site (Peppermill) unrelated to any of the defendants' work. Balance due plaintiff on Job #8, Majestic is $68,673.70.

As to Lot 5, Varela contends he worked off of the stakes place by the surveyor. The foundation was placed 39 feet rather than 51 feet from curb. Defendants argue that they then had to get a variance to leave the house at the new location, otherwise rip it down and relocate it.

The cutsheet for Lot 5 (a document made after a surveyor had placed stakes) shows a 51

feet set back from curb to right corner of the house. Varela laid the foundation at 39.7 feet from curb. This violated the local zoning code and resulted in defendants need for the aforesaid variance (they could not get a C of O without a variance). Defendants had to hire counsel, Michael McCarthy ($2,500.00), an expiditer named Frank Meak ($6,500.00) and it cost the defendants an additional one-half year of taxes ($935.51) due to the delay in selling the lot while the variance was processed.

No one checked the foundation prior to the framers starting their work. A post foundation survey showed the foundation was too close to the curb line.

The court concludes that Varela was responsible for wrongfully placing the foundation on Lot 5. This caused damages to defendants totaling $9,935.00.

The defendants argue the documents in defendants's exhibit "X" preclude the awarding of quantum meruit to plaintiff. Exhibit X contains undated documents entitled "Job Material & Labor Records" (JMLR), written work-ups of estimated prices on different models of homes built at Majestic as well as at Pinewood Hollow-Manorville (Job #9) and, perhaps, Pinewood Manor West (Job #10). These documents, Job Material & Labor Records ("JMLR"), cover the models known as Ashley, Tara, Windsor, Buckingham (Majestic), Taylor and Cedar. There is no JMLR for the Newport. Defendants argue that the documents which contain Mr. Varela's detailed work-up as well as a price for the model and then a lesser price, are signed by Mr. Varela and Mr. Iannucci (the excavator) who was supposedly representing Pinewood at that time. Defendants argue that these documents show a clear agreement as to the price to be charged and the scope of work to be done on different models. Relying on Sheifer v. Shenkman Capital Management, 291 A.D.2d 295 (1st Dept. 2002), 737 N.Y.S.2d 609, defendants argue that relief in quasi-contracts can only be granted where there has been "no agreement or expression of assent by word or act on the part of either party involved." Clark Fitzpatrick, Inc. v. Long Island Railroad Company, 70 N.Y.2d 382 (1987).

"Quasi-contract is defined as a contract implied-in-law. An implied-in-law contract is an obligation imposed by law because of the conduct of the parties or some special relationship between them, or because one of them would otherwise be unjustly enriched. An implied-in-law contract is not actually a contract instead a remedy that allows the plaintiff or recover a benefit conferred on the defendant, while quantum meruit is "damages awarded in an amount considered

reasonable to compensate a person who has rendered services in a quasi-contractual relationship." Black's Law Dictionary, Seventh Edition, West Group, 1999.

The issue becomes whether the documents signed and created at least partially by Mr. Varela and signed by Mr. Iannucci are sufficient to be equivalent to a contract and preclude a quantum meruit claim on the specific issue related to the JMLR as to a specific model. Then, if they do, should they be used to determine what, if anything, is due plaintiff on these jobs? Thus, if there is a JMLR for a particular model that document would control the pricing for that model unless the work done was in excess or different from the work described and priced in the JMLR.

Despite the protestations of the defense, it is clear to the court that on many occasions during the course of the parties relationship over numerous projects, defendants modified models on a particular job.

There were eight foundations poured at Majestic by plaintiff, three Buckinghams, one Windsor and four Newports. Exhibit 29 contains surveyor site plans for these models and one work order for a 9 foot (foundation) at Windsor. The JMLR in defendants' Exhibit X for the Windsor states "total 2 job $37,500." This is Iannucci's writing. Varela's writing shows $38,913.93. Only 1 Windsor was erected by Varela at Majestic. Thus, the court cannot determine if the JMLR for the Windsor was to pertain to the Majestic-Windsor.

Mr. Iannucci was an investor in Pinewood. His investment was in the form of excavation for the foundations and he estimated his work at $400,000.00. Mr. Iannucci believes the price of $20,500.00 on an Ashley as found on the JMLR in Exhibit X was for Pinewood Hollow. This price was to cover labor and materials. The same holds true for the Tara at $13,680.00, the Taylor at $14,000.00, and the Cedar at $12,850.00. The JMLR for the Buckingham does not contain his handwriting. The Windsor JMLR was for two homes. This does contain his handwriting. He testified he and Varela worked out the price from the original plans, calculating the concrete to be used on the left side of the page. He believed that the JMLRs in Exhibit X were for Pinewood Hollow (Manorville) and Majestic. They met twice at the Hicksville office of Pinewood. On the second occasion the Windsor and Buckingham models were discussed. Either Uri or Avi or both were present at these discussions. Apparently defendants wanted Varela to sign these documents and plaintiff wanted Iannucci to sign. There is yellow highlights placed on top of the pencil signatures to prevent erasure (as per Uri Hason's testimony). Mr. Hason

testified they did not ask Tony to sign. Further, that Iannucci was not authorized to sign for Pinewood. Mr. Hason testified that prices were agreed to and he signed it (T.T., p. 101). There is no evidence of Mr. Hason signing anything relating to an agreed price on any model on Jobs #8, #9 or #10.

Though these documents are instructive as to the pricing of the different models on the jobs, they are not sufficient to preclude a finding in quasi-contract or preclude a quantum meruit award. The fact that Iannucci did not sign on behalf of the defendants, but apparently at the insistence of Tony, and the conflicting testimony of Mr. Hason of whether he directed Tony to sign or did not, weakens the reliability of these documents. The above finding by the court in quantum meruit shall stand.

Furthermore, neither side has done any calculations on how these all inclusive prices on some models without deducting the cost of the concrete (paid by defendant or to a much lesser extent by plaintiff) and adding on the extras where appropriate would impact on the court's finding using those documents in defendants' Exhibit X. In fact, defendants have not argued that these documents should control the price, but rather that they should preclude a quasi-contract finding and apparently preclude any award in any form to plaintiff on at least Jobs #9 and #10 and, perhaps, Job #8 also.

JOB #9, MANORVILLE (A/K/A PINEWOOD HOLLOW)
(NINTH CAUSE OF ACTION)
APRIL 19, 2002 TO JUNE 21, 2004

Mr. Varela argues that the prices for the work on Job #9 were established in late 2000 or early 2001, long before the job began. This job was done at the same time Job #8 was under construction and also part of Job #10.

Dominick Iannucci testified that the price was not established until a month or so before work began and references the Job Material & Labor Records (Defendants' Exhibit X. This is not to be confused with court Exhibit X (Roman Numeral 10). Varela stated, in contradiction, that Hason said he needed the price for the work before he bought the property. In fact, the cost of the cellar entrance, so he says, went from $1,000.00 to $1,500.00 due to a design change. In an attempt to explain why he produced invoices dated April 2004 for work done nearly two years earlier, he states that Sharabani told him they did not need invoices on Job #9. It was only when he closed on the lot they gave him (Lot 24, April 5, 2004) that he was told he had to produce

invoices for the work on this project. He argues he brought them to the closing, but because they were hastily prepared (translation - inaccurate), he had to replace them.

Over a three year period (2002 to 2004 according to plaintiff) 3,353 cubic yards were delivered to this job. Mr. Suckow, working from the plans of the Cedar, Taylor and Ashley models, determined the cubic yards needed for the basic house as well as garage, porch, den, step, cellar entrance and chimney. Using his calculations, the concrete needed for the 25 homes with 25 garages, 25 porches, 11 dens, 14 steps and 8 cellar entrances totals 2,828.7 cubic yards. This would result in the delivery of 524.3 cubic yards more concrete than would have been used on the job pursuant to delivery records found in plaintiff's Exhibit 11.

Mr. Varela proffers an explanation for the missing concrete. He argues from Exhibit 90 that the front wall of each house that had a brick front was 10 inches wide not 8 inches to accommodate the shelf for the brick. Exhibit 90 is an undated "Job Material & Labor Record." Line 2 of this document apparently reflects the calculations for a shelf. It also contains a price for an 8 foot Taylor and a 9 foot Taylor model. Varela also points out that he had to replace the entire foundation in Lot 22 (which would be 63 cubic yards) and partially replace the foundation on Lot 17 (0-97.6 cubic yards). The problem? It is not clear whether replacement on Lot 22 was due to plaintiff's negligence or error by defendant, or whether there was a replacement on Lot 17.

The cubic yard rate testified to by Mr. Ramos was different in each year and differed for each model and foundation height. Mr. Ramos lacks the experience to give reliable pricing testimony on multi-unit developments. The cost of the concrete on Job #9 was $265,249.32. Using Mr. Carvalho's pricing theory of concrete cost minus 10% of said cost to determine cubic yard labor rate, the court finds the labor rate to be $78.00 per cubic yard less 10% ($7.80), equaling $70.20 per cubic yard unless it was special work at a higher labor rate. Using the basic rate and multiplying it by the Suckow aforementioned measurements, the labor cost would be $198,574.00.

The court also finds that there was a wider shelf built at the front of houses to accommodate a brick front. Further, there is a rational for at least a spread footing or a 12 inch slab to replace a footing for a total of 433 cubic yards. Again, using the $70.20 cubic yard rate as fixed by the court, is an additional $30,397.00 for a total of $228,971.00 as the reasonable value of the work done by plaintiff on the Manorville job site - Job #9. The plaintiff received

$28,000.00 and a lot at Manorville with an agreed value of $200,000.00 for the work completed at Manorville. Balance due plaintiff is $971.00.

If the court were to accept the prices set in defendants' Exhibit X for the 25 models built at Job #9, as testified to by Mr. Hason and Mr. Iannucci, the total cost of Job #9 would be $411,433.00. This does not include alleged extras as testified to by Mr. Varela. It does, however, include a 10% increase for the 9 foot versus 8 foot models of the Cedar, Taylor, Tara and Ashley. Without the 10% differential for the 9 foot models, we would still have a total cost of $404,000.00 rather than $228,971.00 found by the court. Defendants argue that the court should preclude quantum meruit based on the existence of Exhibit X, but apparently does not want defendants' Exhibit X used to determine the fair and reasonable value of the work performed.

JOB #10, PINEWOOD MANOR WEST
(THIRTY-FOURTH CAUSE OF ACTION)

Work at this site started on July 14, 2003 and ended October 23, 2004 (Exhibit 38 reflects deliveries as of July 14, 2003). Mr. Hason testified that he and Varela discussed this project. He testified that Varela agreed to do Job #10 at the same price he had agreed to Job #9. Hason denied there had been an agreed upon raise in the price from $145.00 to $150.00 cubic yards in the middle of the job as Varela contends. He agrees the cellar entrances were to be an extra on these homes ($1,500.00), but not on the Cedar. There the cellar entrance was to be included.

Not counting the cellar entrances on the Cedar model - there were 14 - cellar entrances as extras on this job. The court finds $1,200.00 per cellar entrance was a fair and reasonable amount for the work performed. Total for cellar entrances is $16,800.00.

The cubic yards used on Job #10, according to Mr. Suckow's testimony and Exhibits 112 and 113, including cellar entrances on Cedar models, but not on the others, was 3,291.9 cubic yards. The average cubic yard price of $78.63, less a 10% volume discount (Carvalho) of $7.86 per cubic yard equals $70.77 per cubic yard as the labor rate. The total labor for Job #10, not including the above noted cellar entrances, is $232,904.00. Adding to this amount the aforementioned 14 extra cellar entrances of $16,800.00, the total labor rate on Job #10 (Pinewood Manor West) is $249,704.00.

There were 4 Cedars built without cellar entrances, but the cost of the construction was

built into the price. Therefore, defendant is due a credit for those 4 entrances which have been included in the above calculation (4 X 8 cubic yards X $70.70 = $2,262.00). The new labor total on this job is $249,704.00 - $2,262.00 = $247,442.00.

The court recognizes payments on Job #10 of $107,697.00 (Exhibit 39). The balance due on Job #10 is $139,745.00.

RECAP

JOB #	**BALANCE DUE**
1	$ -0-
2	$318,851.00
3	$ 79,137.50
4	$ -0-
5	$ 414.04
6	$ 8,957.50
7	$ 2,887.50
8	$ 68,673.70
Credit for wrongfully pouring foundation on Lot 5.	($ 9,935.00)
9	$ 971.00
10	$139,745.00
TOTAL	$609,702.24

The defendants have requested punitive damages against plaintiff. They base this claim on the less than normal billing practices of plaintiff and his record keeping that leave much to be desired, and, in fact, could be considered as fraudulent along with his theft of concrete and alleged filling of a french drain with concrete. Specifically, defendants have demanded damages in the amount of $111,300.00 accounting for defendants' expenses and legal fees as of February 5, 2007 for having been forced to defend this action which they contend was false and frivolous. Defendants' counsel billed at $300.00 per hour for out of court time and $350.00 per hour for court time. This case was tried over a three month period, with actual trial days of over 30 days. Defendants argue that "but for" the fraudulent claims of the plaintiff these fees would not have been incurred. Defendants also argue that all the causes of action, especially these in equity, were frivolous, false and brought in bad faith. They contend that pursuant to Part 130 of

NYCRR Title 22 they should be entitled to sanctions of $10,000.00 per cause of action. Defendants do agree and believe that plaintiff's counsel was also a victim of plaintiff's lies in plaintiff's efforts at fraud (the invoice). They only request punitive damages as to plaintiff.

Defendants argue that the court should award them punitive damages equivalent to costs and attorney's fees in light of the plaintiff's fraudulent acts set forth above and as previously stated in the court's discussion of the various construction. Plaintiff contends that the court should not be awarding punitive damages for what he has called "non-standard record keeping and billing practices."

To label plaintiff's action in recreating invoices, falsifying invoices, being untruthful to the court as to his prior invoices, and their "demise," as non-standard record keeping is comparable to calling Mount Everest an elevated green at a local golf course. However, defendants' application is rejected. In the opinion of the court, punitive damages is not appropriate under our circumstances in the construction industry. There is no message to be sent nor a segment of the public to be protected from some alleged unscrupulous practice of plaintiff as there was in Ross v. Louise Wise Services, Inc., 3 Misc.3d 279 (N.Y. County, 2007) (cited by defendants). Nothing in our facts compares to the alleged "outrageous conduct which cannot be tolerated in a civilized society" in failing to reveal a child's parent's mental illness history to adoptive parents.

The one damaged most by plaintiff's creation of seemingly false invoices to replace others is plaintiff. The defendants' claim of injury can be directly related to their own failing in not retaining records and producing proof of payment, which one would think would be relatively easy.

What is sorely missed in this case has been testimony of anyone from defendants who would have had oversight of any of these construction sites. Anyone who might have given positive evidence as to the work done by plaintiff, who had directed the plaintiff to do work on any one or more of the lots, on any or more of the job sites. The court has not drawn a negative inference against the defendants for the lack of this testimony, but had we had it, it may have been possible to draw a negative inference against plaintiff.

Any claim of fraud based upon plaintiff's "style" of bookkeeping is rejected. There has been no proof by any standard and definitely not by clear and convincing evidence that

defendants relied on these invoices offered at trial or suffered any loss based on the plaintiff's modified, changed invoices. They suffered no liability from the second or, perhaps, third set of invoices, all of which the court struck from the record on trial.

The stolen concrete claim was admitted by plaintiff and addressed by the court. The court has addressed the damage claim related to the misplaced foundation on Lot 5 at Majestic within the Majestic ruling.

The court further finds that there is insufficient proof that the plaintiff's failure to properly care for the lot (Lot 24) he was given in the Manorville development was or is now responsible for damages to defendants. However, in case there are open violations of any kind remaining on said property (his lot), they are to be cleared by plaintiff within forty-five (45) days of the date of this decision and order. Failure to clear any such violations will result in the awarding of sanctions against plaintiff at $350.00 per day as of the forty-sixth (46th) day until proof of clearance has been provided to the court.

The court would impose greater sanctions, but it is not satisfied that the defendants continue to pay for the bond nor, if they do, whether it is being maintained solely due to plaintiff's acts vis-a-vis Lot 24.

The court, however, does believe that actions like that of Mr. Varela, which caused this trial to at least double in length due to his incredible testimony as to the invoices, which led the trial to become one of a quantum meruit nature, requiring the testimony of three expert witnesses and a professional engineer, support the imposition of sanctions.

Section 22 NYCRR 130-1.1 Costs; Sanctions states:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.
>
> 130-1.1(c) states:
>
> For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law or fact and cannot be supported by a

reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statement that are false.

The acts and testimony of the plaintiff clearly fit the definition of frivolous conduct especially the third definition. It is clear that plaintiff's testimony as to the original content of the invoices was in many ways just incredible.

Such a finding supports the imposition of actual costs and reasonable attorney fees for the actual days wasted on trial due to Varela's testimony about the invoices. The court, upon review of its own notes, which totaled over 330 pages, concludes that 10 days of trial could have been avoided "but for" the actions of Varela which the court has concluded were frivolous,

Using defense counsel's stated in court hourly rate of $350.00 per hour and out of court rate of $300.00 per hour, the court imposes sanctions of $2,700.00 per day (6 hour trial day plus 2 hours out of court time) for 10 days upon plaintiff. Said amount of $27,000.00 shall be a credit against any amounts due plaintiff by defendants.

In addition, the normal "costs" that would be awarded to plaintiff as the successful party in the lawsuit are denied, based upon plaintiff's frivolous conduct.

The balance due plaintiff after deduction of the above sanctions of $27,000.00 equals $582,702.24.

All affirmative defenses or counterclaims not addressed by the court are denied.

Submit Judgment on notice.

Dated: October 22, 2007

J.S.C.